IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

GREENBRIAR DIGGING SERVICE LIMITED PARTNERSHIP and INSURANCE COMPANY OF THE WEST **PLAINTIFFS**

VS. **CIVIL ACTION NO. 3:07-CV-00601-DPJ-JCS**

SOUTH CENTRAL WATER ASSOCIATION, INC. **DEFENDANT**

SUPPLEMENTAL PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY GREENBRIAR DIGGING SERVICE LIMITED PARTNERSHIP AND INSURANCE COMPANY OF THE WEST

Greenbriar Digging Service Limited Partnership ("Greenbriar") and Insurance Company of the West ("ICW"), without waiving their right to appeal the Court's Order of March 26, 2009, submit alternative Supplemental Proposed Findings of Fact and Conclusions of Law.

Findings of Fact

1. On April 6, 2004, Greenbriar entered into a contract with South Central for that project designated as "Contract III: Ozone Water Treatment Facility" ("the Project"), the essential purpose of which was to install an ozone system to reduce the color in the water produced by South Central's well number 4. *

2. The project was designed by Diversified Consultants, Inc. ("the Project Engineer"), who had a contract with South Central for the design of the ozone system and

Exhibit "C"

* Findings of Fact with an asterisk appear in the Pre-Trial Order as established by the pleadings, by stipulation or by admission.

its accessory parts. *

3. The Project Engineer designed the ozone system after consultation with Hankin Ozone Systems, Limited, a manufacturer of ozone generating equipment now known as Ozocan Corporation ("Ozocan") and D&W Systems Sales, Inc., the retail seller of the ozone system. *

4. The project was designed around the Ozocan system, and the ozone generator referenced in the Project Engineer's specifications is the "Hankin Ozone Systems Limited OzoPulse Model PH 58 ozone generator, or equal". *

5. Greenbriar had no input into the design of the project. *

6. The Contract's Technical Specifications at Page I-3 through I-4 call for only one ozone generator capable of producing 100 pounds of ozone per day. *

7. Greenbriar's submittal of its proposed ozone equipment was based upon the Ozocan system described in the Project Engineer's specifications, and the Project Engineer approved Greenbriar's submittal. *

8. Greenbriar installed the equipment as specified by the contract documents and as approved by the Project Engineer. *

9. The Contract between Greenbriar and South Central includes the following: *

> GUARANTEE REQUIREMENTS: The contractor shall guarantee that the ozonation system will reduce the color in raw well water from Well 4 to twenty (20) units or less in the finished water, as noted in these Contract Documents. This guarantee shall include the repair,

> without cost to the Owner, of any defect due to design, materials, and/or workmanship.

10. The system installed by Greenbriar is called a pressure system and it reduces the color of the water to 20 units or less at a flow rate between 600 and 700 gallons per minute. *

11. In April 2005, Greenbriar considered the project complete and applied for its final payment of $77,655.29. *

12. By letter dated April 5, 2005, Greenbriar's surety gave its written consent to South Central to make final payment to Greenbriar. *

13. The Project Engineer and South Central claimed that the Contract had not been fully satisfied because the color in the water had not been reduced to 20 units or less at a well flow rate of 1200 gallons per minute. *

14. Thereafter, Ozocan began investigations to determine why its equipment was not satisfying the Project Engineer and what modifications could be made to obtain the Project Engineer's approval. *

15. Ozocan ultimately recommended a substantially different ozone generator with related equipment and accessories different from what was called for in the specifications. *

16. The Project Engineer believes that the wrong size equipment had been originally specified. *

17. The Project Engineer acknowledges that Greenbriar did not deviate from his

design. *

18. The Project Engineer essentially admits that his design is defective and testified that he designed the system with the wrong size equipment.

19. The Project Engineer sized the equipment and specified it by model number, the same model number that Greenbriar relied upon and installed.

20. South Central has been using the Project since April 15, 2005, except for when it has been down for maintenance. *

21. After South Central refused to make the final payment of $77,655.29, Greenbriar brought this suit to recover Greenbriar's final payment of $77,655.25, and ICW and Greenbriar sought declaratory relief in the form of a Judgment that they have no liability to South Central on the contract and performance bond. South Central counterclaimed for breach of the contract and the performance bond.

22. By Order entered March 26, 2009, the Court found Greenbriar liable to South Central reserving for trial the issue of South Central's damages. *

23. At trial on South Central's damages, South Central offered the testimony and a report by its expert witness Wayne Wolf, who recommended a completely new vacuum ozonation system at a cost of $1,204,000 in order to achieve South Central's treatment goals of 20 color units at a flow rate of 1200 gallons per minute. (Trial Tr., p. 38). The vacuum system proposed by Mr. Wolf at trial is not a "repair" but a completely new system.

Greenbriar offered evidence of the cost of $320,000 for a pressure system to achieve South Central's treatment goals. (Trial Tr., p. 81).

24. Because the Court was not persuaded that a vacuum system was necessary, that it was comparably priced with a pressure system, and that the vacuum system recommended by Mr. Wolf would put South Central in the same position had there been no breach (Trial Tr. p. 101), the Court offered the parties an opportunity to have a Rule 706 expert designated. By mutual agreement, the parties selected Michael Oneby as the Rule 706 expert.

25. Mr. Oneby issued his report dated December 3, 2009, and the parties deposed him on January 7, 2010.

ALTERNATIVE I

26. Mr. Oneby made alternative recommendations. Option 1 involves removing the current pressure system and installing 2 new pressure generators capable of producing 280 pounds per day of Ozone at a cost of $990,000. Option 2 involves installing a pressure system parallel to the existing system to produce another 180 pounds per day of ozone at a cost of $525,000. By his own admission, Option 1 is not "a repair". (Depo, p. 44, l. 3-6). In its Motion for Rule 706 Expert Supplemental Report (ECF Doc. 78), South Central essentially acknowledges that Option 1 "may be more than that to which it is entitled under the law". The Court agrees.

27. It is unclear from the record exactly how much of a contingency Mr. Oneby built into his pricing ("on the high side", Depo, p. 7, l. 14; "20 to 40 to 50 percent variance in this

price estimate", Depo, p. 12, l. 25 to p. 13, l. 1; "I stay on the high side and that way we can reduce costs as the project progresses and we obtain more information", Depo, p. 13, l. 9-10; "I would say that it could be as much as 40 percent off", Depo., p. 13, l. 20-21; "This is within zero to 20 percent above what the final cost would be." Depo., p. 14, l. 3-5).

28. Because Mr. Oneby's report and recommendations are wholly inconclusive as to the cost for an ozonation system that will meet South Central's water treatment goals, the Court is left with the evidence adduced at trial as to damages.

Conclusions of Law

1. The burden is upon South Central to prove the damages it claims it suffered. *Boling v. A-1 Detective & Patrol Svc., Inc.*, 659 So. 2d 586, 590 (Miss. 1995).

2. When a project is completed substantially according to plans and specifications, the measure of damages is determined by the cost of repairing the defects to make the project conform to the specifications where such may be done at a reasonable expense or by the diminished value, which is the difference in the value of the project with the defective work and what the value would have been had there been strict compliance with the contract. *The Sumrall Church of the Lord Jesus Christ v. Johnson*, 757 So. 2d 311, 314 (Miss. 2000). There has been no proof offered by either party as to the diminished value of the project.

3. As a matter of law, the Court finds that South Central has failed to carry its burden of proof as to the cost to repair the system. Instead, what South Central offered was

the cost for a completely new and different kind of system, i.e., a vacuum system. While the Court has found that Greenbriar breached the contract by failing to meet the performance guarantee, in the absence of proof of damages by South Central, the Court will award it nominal damages of $_____ as mandated by *Morrow v. Barron Motor Company*, 90 So.2d 20, 14 (Miss. 1956); and *Worldwide Forest Products, Inc. v. Winston Holding Co.*, 1999 U.S. Dist. LEXIS 2605 (N.D.Miss. 1999).

SO ORDERED AND ADJUDGED on this ____ day of February, 2010.

_____
United States District Judge

OR

ALTERNATIVE II

26. Mr. Oneby made alternative recommendations. Option 1 involves removing the current pressure system and installing 2 new pressure generators capable of producing 280 pounds per day of Ozone at a cost of $990,000. Option 2 involves installing a pressure system parallel to the existing system to produce another 180 pounds per day of ozone at a cost of $525,000. By his own admission, Option 1 is not "a repair". (Depo, p. 44, l. 3-6). In its Motion for Rule 706 Expert Supplemental Report (ECF Doc. 78), South Central essentially acknowledges that Option 1 "may be more than that to which it is entitled under the law". The Court agrees and will, therefore, focus its attention on Option 2.

27. Although it is unclear from the record exactly how much of a contingency Mr. Oneby built into his $525,000 price ("on the high side", Depo, p. 7, l. 14; "20 to 40 to 50 percent variance in this price estimate", Depo, p. 12, l. 25 to p. 13, l. 1; "I stay on the high side and that way we can reduce costs as the project progresses and we obtain more information", Depo, p. 13, l. 9-10; "I would say that it could be as much as 40 percent off", Depo., p. 13, l. 20-21; "This is within zero to 20 percent above what the final cost would be." Depo., p. 14, l. 3-5), the Court concludes that the $525,000 cost should be reduced to $420,000 after deducting 20%.

28. The performance guarantee of 20 color units or less at 1200 gallons per minute is unrelated to any consideration of redundancy, described by Mr. Oneby as the ability to keep the ozonation system running when part of it is down for maintenance. (Depo. p. 37, l. 7-12).

29. Mr. Oneby's Option 2 includes an ozone destruct unit valued at $30,000 which he described as "the redundant unit, assuming that the existing ozone destruct unit has sufficient capacity for the 280 pounds per day or with slight modifications". (Depo., p. 35, l. 20 to p. 36, l. 2). Accordingly, the Court does not award South Central the costs of this ozone destruct unit which represents redundancy.

30. Option 2 also includes an additional air compressor to provide redundancy, Depo., p. 38, l. 19-23, and this additional compressor has a value of $25,000. (Depo. p. 38,

l. 24 to p. 39, l. 2). The Court will further reduce South Central's damages by the cost of this redundant compressor.

31. Mr. Oneby testified that his Option 2 includes one injection skid that "may not be required", Depo., p. 36, l. 15-19, and that the value of this item is "maybe $10,000". (Depo., p. 41, l. 12-18). The Court, therefore, reduces the amount of South Central's damages by $10,000 based upon the uncertainty as to the need for this item.

32. Mr. Oneby also testified that the salvage value of the current compressors is $5,000. (Depo., p. 47, l. 12 to p. 48, l. 5). The Court finds that this amount should be further deducted from South Central's damages.

33. The Court will not consider any estimates of engineering costs that were made by Mr. Oneby in response to deposition questions from South Central's attorney. In previously over ruling South Central's Motion for Rule 706 Expert Supplemental Report, the Court held that the "parties...are not to supplement damage catagories that the parties did not address in their evidence at trial," (Order, ECF Doc. 79), and South Central offered no evidence at trial of engineering costs as part of its claim for damages.

Conclusions of Law

1. The burden is upon South Central to prove the damages it claims it suffered. *Boling v. A-1 Detective & Patrol Svc., Inc.*, 659 So. 2d 586, 590 (Miss. 1995).

2. When a project is completed substantially according to plans and specifications, the measure of damages is determined by the cost of repairing the defects to

make the project conform to the specifications where such may be done at a reasonable expense or by the diminished value, which is the difference in the value of the project with the defective work and what the value would have been had there been strict compliance with the contract. *The Sumrall Church of the Lord Jesus Christ v. Johnson*, 757 So. 2d 311, 314 (Miss. 2000). There has been no proof offered by either party as to the diminished value of the project; accordingly, the Court must determine the reasonable expense necessary to repair the existing system and make the project conform to the specifications.

3. The purpose of damages is to put the aggrieved party in the same position it would have been in had there been no breach, *Theobold v. Nosser*, 752 So. 2d 1036, 1042 (Miss. 1999) appeal after remand 784 So. 2d 142, rehearing denied. Based upon the above facts, the Court finds that South Central's damages are $350,000 and that South Central is entitled to recover this sum less $77,655.29, the final payment to Greenbriar that South Central withheld, or $272,344.71.

SO ORDERED AND ADJUDGED on this 1st day of February, 2010.

_____

United States District Judge

Respectfully submitted,

GREENBRIAR DIGGING SERVICE
LIMITED PARTNERSHIP AND
INSURANCE COMPANY OF THE WEST

By: /s/ Ron A. Yarbrough
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CERTIFICATE OF SERVICE

I, Ron A. Yarbrough, hereby certify that I have electronically forwarded a copy of this document to:

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This the 1st day of February, 2010.

/s/ Ron A. Yarbrough
Ron A. Yarbrough